IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA18/2020
[2020] NZCA 223

BETWEEN	YAN ZHANG Appellant
AND	TELCO ASSET MANAGEMENT LIMITED Respondent

CA150/2020

BETWEEN	YAN ZHANG Appellant
AND	TELCO ASSET MANAGEMENT LIMITED Respondent

Court: Kós P and Courtney JJ

Counsel: Appellant in Person
T P Cleary for Respondent

Judgment: (On the papers) 8 June 2020 at 2 pm

JUDGMENT OF THE COURT

A An extension of time is granted to apply for leave to appeal.

B The application for leave to appeal the substantive decision is dismissed.

C The application for leave to appeal the costs judgment is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Yan Zhang seeks leave to appeal against a decision of Judge Corkill in the Employment Court at Wellington. Mr Zhang's former employer, the respondent, Telco Asset Management Ltd (Telco), opposes the application.

[2] Telco disestablished Mr Zhang's position and terminated his employment in 2017. Mr Zhang successfully challenged the termination before the Employment Relations Authority (the Authority).[1] Mr Zhang was, however, dissatisfied with the remedies granted by the Authority, and brought a late non-de novo challenge to the determination in the Employment Court.[2] Mr Zhang's challenge was successful on two of five grounds.[3]

[3] Mr Zhang applied 55 days out of time (or 41 days excluding the Christmas break) for leave to appeal from the Employment Court's decision[4] and subsequent costs decision.[5] He also applied for an extension of time to make the leave application.

[4] Mr Zhang's right of appeal lies under s 214 of the Employment Relations Act 2000 (ERA) and is limited to questions of law. Leave may be granted if the question of law is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.[6]

[5] Mr Zhang raises a number of proposed grounds of appeal which can be summarised as being that the Judge erred in:[7]

(a) taking the wrong approach to the counter-factual inquiry under s 128;

(b) failing to impose a penalty under s 4A;

---

1 *Zhang v Telco Asset Management Ltd* [2018] NZERA Wellington 84 [ERA determination].
2 Pursuant to s 182(3) of the Employment Relations Act 2000 (ERA).
3 *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151 [Substantive judgment].
4 ERA, s 214(2).
5 *Zhang v Telco Asset Management Ltd* [2020] NZEmpC 9 [Costs judgment].
6 ERA, s 214(3).
7 All provisions cited in Mr Zhang's proposed grounds of appeal refer to the ERA.

(c) taking into account a factual finding by the Authority that was unchallenged in considering the award to be made for humiliation and loss of dignity under 123(1)(c)(i);

(d) breaching the principles of natural justice;

(e) assessing Telco's conduct under s 103A;

(f) assessing Telco's breach of good faith under s 4;

(g) assessing Mr Zhang's contributory conduct; and

(h) failing to impose a penalty under s 135.

[6] Mr Zhang says that leave to appeal the costs judgment should be granted because it is part of the substantive judgment under appeal. That is not correct; the judgments and the respective leave applications are separate. Mr Zhang's two proposed grounds of appeal against the costs judgment are that the Employment Court:

(a) wrongly refused to treat successful challenges to findings of fact as relevant to costs; and

(b) used the wrong daily rate in calculating costs.

Extension of time to bring applications for leave to appeal

[7] Mr Zhang submits that he should be granted an extension of time to file his application for leave to appeal because: the length of delay is not significant; there is a good explanation; he has notified the respondent of the delay and appealed the costs judgment in a timely manner; and there is no prejudice. The reasons for the delay are canvassed in Mr Zhang's affidavit: he is now unrepresented and English is his second language; he has been studying while also caring for his child full-time; there was a typographical error in the Employment Court judgment which needed to be corrected (the respondent unsuccessfully applied for a recall on this basis).

[8] Telco opposes any extension of time due to the length of the delay, inadequate reasons for that delay, Mr Zhang's previous failure to meet appeal deadlines, the general prejudice of ongoing litigation, and the lack of merit of the application for leave.

[9] Having regard to the clearly genuine reasons for the delay, we grant an extension of time for the filing of the applications for leave to appeal.

Proposed appeal against substantive decision

Background

[10] Mr Zhang had worked for Telco for five and a half years as an assistant accountant in the finance team. As a result of Telco divesting itself of some of the companies in its group it disestablished Mr Zhang's position on the basis that most of his work related to those companies.

[11] Mr Zhang was the only staff member considered for redundancy. The redundancy process was acrimonious. Mr Zhang did not accept Telco's assessment of the extent to which his work had related to the companies that were no longer part of the group. He sought further information which Telco did not provide. He made inflammatory accusations of wrongdoing against the Chief Financial Controller (CFC). Mr Zhang was paid three months' salary for redundancy and outstanding wages, holiday pay and the balance of his notice period.

[12] Mr Zhang brought a personal grievance claim.[8] The Authority found that Mr Zhang's dismissal was substantively and procedurally unjustified. It granted compensation for lost salary and for humiliation and loss of dignity. However, it reduced the awards to reflect Mr Zhang's contributory conduct. On appeal the Employment Court mostly upheld the Authority's findings, though it reduced the level of reduction for contributory conduct. We consider each of the proposed grounds of appeal against the Employment Court's decision separately.

---

8 ERA, s 103.

Question (a): the counter-factual assessment under s 128

[13] The Authority found that, as a result of Mr Zhang's conduct, particularly the accusations he levelled at the CFC, it would have been open for Telco to have commenced a disciplinary inquiry. Moreover, even if Mr Zhang had not been dismissed it was possible that he would have resigned or been made redundant legitimately. It therefore found that the employment relationship would have been unlikely to have lasted more than three further months and declined to exercise its discretion under s 128(3) to award more than three months' remuneration.[9] It awarded three months' remuneration (less PAYE) subject to the question of Mr Zhang's contributory conduct.

[14] The Employment Court differed from the Authority on its reasoning but upheld its ultimate finding. It approached its assessment on the basis of this Court's decisions in *Telecom New Zealand Ltd v Nutter*[10]and *Sam's Fukuyama Food Services Ltd v Zhang.*[11] In the former, the Court said that the assessment of compensation in the particular circumstances "must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment".[12] The Employment Court found that, in all the circumstances, Mr Zhang's employment was unlikely to have lasted more than three months beyond the actual date of termination.[13]

[15] Mr Zhang wishes to argue that the Judge's broad brush approach, following *Nutter*, was not suitable for the present case. In particular, in assessing the counter-factual, the Judge was not entitled to "forecast [Telco's] future … and make any business decision for [Telco]…whether in past or in future". Rather, he asserts that the approaches in *Grace Team Accounting Ltd v Brake*[14] and *Stormont v Peddle Thorp Aitken Ltd* should have been applied.[15]

---

9 ERA determination, above n 1, at [63]–[64].
10 *Telecom New Zealand Ltd v Nutter* (2004) 2 NZELR 83 (CA).
11 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, (2011) 9 NZELR 216.
12 *Telecom*, above n 10, at [81].
13 Substantive judgment, above n 3, at [113].
14 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.
15 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, (2017) 14 NZELR 789.

[16] The Judge undertook an extensive review of the Authority's decision on the basis of settled principles. Neither of the cases that Mr Zhang relies on run counter to *Nutter* and *Sam's Fukuyama Food Services*. No question of law arises that would justify a second appeal.

Question (b): failing to impose a penalty under s 4A for Telco's breach of good faith

[17] Mr Zhang had sought to have a penalty imposed under s 4A on the basis that Telco was guilty of breaches of its duty of good faith that were deliberate, serious and sustained. The Authority found that this aspect of the claim rested mainly on Telco's analysis of Mr Zhang's workload but that the analysis was never intended to be an exact appraisal and did not justify a penalty.[16]

[18] This aspect of the claim was put on a much broader basis in the Employment Court. The Judge found that there had been a number of breaches by Telco of its good faith duty, particularly the duty to provide access to information and the opportunity to comment on information before a decision is made. However, he also considered that Mr Zhang's conduct was relevant and that, having regard to that aspect, no penalty was warranted.[17]

[19] Mr Zhang wishes to argue that his conduct was not relevant to the question of penalty. Telco says that ruling on penalty is discretionary and that, in any event, there had been no finding that its good faith breaches met the statutory threshold of being deliberate, serious and sustained.

[20] Telco's conduct has now been the subject of concurrent findings in the Authority and the Employment Court, which tells against a further appeal. Nor do the circumstances suggest an evidential basis for a finding that would satisfy s 4A(a). A second appeal is not justified on this ground.

---

16 ERA determination, above n 1, at [76].
17 Substantive judgment, above n 3, at [154]–[162].

Question (c): the award for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i)

[21] The Authority made an award of $10,000 under s 123(1)(c)(i). On appeal, the Judge accepted that Mr Zhang had suffered from humiliation, loss of dignity and injury to feelings and increased the award to $22,500. The proposed ground of appeal is directed to the Judge's treatment of a finding by the Authority that Mr Zhang's statements about the CFC were not an emotional response to the redundancy process and therefore not a factor in assessing compensation under s 123.[18] The Judge noted that this finding of fact was unchallenged.[19] He also noted Mr Zhang's assertion that he was angry and hurt by his perception of the CFC's distortion of the facts but considered that it was to be put aside because the Authority's finding had not been challenged.[20]

[22] The proposed ground of appeal is, essentially, that the Judge was wrong to proceed on the basis that if the Authority's finding was unchallenged it was necessarily right. But since there was no challenge to the Authority's finding the Judge was bound to proceed on the basis that it was correct and no question of law arises. We note, in any event, that this fact did not deter the Judge from finding that the consequences complained of were primarily caused by the flaws identified by the Authority, leading to the substantial increase in the award.[21]

Question (d): breach of natural justice

[23] Mr Zhang wishes to argue that Telco adduced conflicting and false evidence in the Employment Court and that the Judge made findings that lacked an evidential basis. He submits this amounted to a breach of natural justice affirmed in s 27(1) of the New Zealand Bill of Rights Act 1990.

[24] Mr Zhang was represented at trial and his counsel was able to cross-examine Telco's witnesses. There is no complaint about the actual conduct of the trial; Mr Zhang's complaint relates to specific findings made by the Judge. However, none

---

18 ERA determination, above n 1, at [67].
19 Substantive judgment, above n 3, at [123].
20 At [124].
21 At [125].

of the points raised indicate unfairness in the trial that might justify a second appeal. In particular, at [110], [111] and [146] the Judge made findings to the effect that Mr Zhang's conduct in relation to his accusations against the CFC may have led to a warning being given but would not have warranted dismissal. Mr Zhang wishes to challenge these findings on the basis that there was no evidence of a warning being given. Mr Zhang has, it appears, misunderstood what the Judge was saying and failed to appreciate that these were not factual findings but rather part of the counter-factual assessment.

[25] There is no apparent basis for argument that the Judge made factual findings that lacked an evidential foundation. No question of law arises that could support a second appeal.

Questions (e) and (g): ss 103A and s 124 — contributory conduct

[26] These two questions overlap and we deal with them together. As already noted, the Authority and the Employment Court were both satisfied that Telco had wrongly dismissed Mr Zhang. But both also found that Mr Zhang had contributed to creating a situation in which it was reasonable for Telco to conclude that he would not engage with it in good faith, and reduced the level of recovery accordingly. The Authority found Mr Zhang's conduct to have contributed to the outcome to the extent of 50 per cent.[22] The Judge found that, while Mr Zhang's conduct was blameworthy, the level of contribution was only 20 per cent.[23]

[27] Mr Zhang's proposed ground of challenge focuses on the personal grievance process and the findings relating to it. His complaint is that the Judge failed to properly consider Telco's actions and instead "made decisions for [Telco]", particularly that a warning was appropriate and that there were performance issues, which was contrary to the evidence. Mr Zhang submits that the level of remedy granted was reduced on the basis of those conclusions. Mr Zhang expressly rejects s 124 as having any relevance to that aspect but in question (g) again raises the complaint that the Judge had made a "decision on behalf of [the] employer on top of [the] employer's decision

---

22 ERA determination, above n 1, at [75].
23 Substantive judgment, above n 3, at [149].

and then use[d] those conclusions to further conclude [Mr Zhang] contributed to the dismissal".

[28] It is clear from the judgment that the Judge did not "make decisions" for Telco. He made findings about Mr Zhang's personal grievance which included, as part of the counter-factual, that Mr Zhang's conduct could (hypothetically) have led to a warning by Telco. These findings do not raise any question of law. The Judge made a determination regarding the reduction for contributory conduct as permitted by s 124. No question of law arises in respect of either complaint.

Question (f): the duty of good faith

[29] It is very difficult to discern this proposed ground of appeal. Mr Zhang says that he had the right to make the complaints he did during the redundancy process and that his comments were genuine and legitimate. But there is no issue about this; before the Employment Court Mr Zhang asserted that Telco had breached its duty of good faith in a number of ways and the Judge accepted that.

[30] The complaint seems to be, again, that the Judge "[made a] decision on behalf of [the] employer…and then use[d] those conclusions to further conclude [Mr Zhang] breached good faith". There is simply no basis on which to elevate this complaint to a question of law that might be the subject of a second appeal.

Question (h): failing to impose a penalty under s 135 for failing to conduct a remuneration review

[31] Telco failed to review Mr Zhang's remuneration in 2016 as required under his employment contract. He sought to have a penalty imposed in response. The Authority found that the failure was the result of oversight, had no effect on Mr Zhang's remuneration because no staff member received a salary increase during the relevant period and did not warrant a penalty.[24] In the Employment Court, the Judge concluded that the failure to conduct the review appeared to have been an isolated aberration which occurred through oversight. He held that had a review been

[24] ERA determination, above n 1, at [59]–[61].

conducted the result would have been the same, i.e. no increase. Finally he considered that it was open to the Authority to exercise its discretion against imposing a penalty.[25]

[32] Mr Zhang asserts that the factual finding of oversight was inconsistent with the evidence and that it was not open to the Judge to "forecast the result of any remuneration review". He also wishes to argue that the Judge failed to take into account the inherent inequality of power in his employment relationship. The first two points are findings of fact that do not give rise to a question of law. The third is the Judge's assessment as to the Authority's exercise of its discretion and there is nothing to suggest that a question of law arises from it, much less one that would justify a second appeal.

Conclusion

[33] None of the grounds that Mr Zhang wishes to advance on appeal raise a question of law that would justify a second appeal. The application for leave to appeal the substantive decision is dismissed.

The costs judgment

[34] The Employment Court is empowered to award such costs as it considers reasonable.[26] In exercising its discretion to award costs the Employment Court may have regard to any conduct of the parties tending to increase or contain costs.[27] Under the Employment Court's Guideline Scale, the daily rates to be applied in setting costs are those provided for in the High Court Rules 2016.

[35] The Judge awarded Mr Zhang $6,690 on the basis of it being 25 per cent of the scale costs under the Employment Court's Guideline Scale. In reaching that decision the Judge identified the approach to be taken by reference to this Court's decision in *Health Waikato Ltd v Elmsly*.[28] The rationale for the 25 per cent allowance was that, although the parties had both succeeded to some extent, assessing costs on the basis

---

25 Substantive judgment, above n 3, at [170]–[172].
26 ERA, sch 3 cl 19.
27 Employment Court Regulations 2000, r 68.
28 *Health Waikato Ltd v Elmsly* (2004) 2 NZELR (CA).

of which particular points had been successful was unduly simplistic.[29] The award was one that the Judge considered fairly reflected a reasonable amount of time in respect of the points on which Mr Zhang had succeeded.[30]

[36] Mr Zhang's first proposed ground of appeal is that the Judge applied the wrong legal test by ignoring Mr Zhang's success in challenging findings of fact (particularly relating to his reputation). However, it is evident from the decision that the Judge identified the correct approach and followed it. There is no apparent error.

[37] The second proposed ground relates to the daily rate applied to reach the scale cost on which the costs award was based. The scale costs figure of $26,760 was proposed by Mr Zhang's counsel and agreed to by Telco. Mr Zhang now asserts that the calculation was made on the basis of the old daily rate of $2,230 under the High Court Rules for category 2 proceedings rather than the present figure of $2,390.

[38] It appears that the wrong daily rate was used, at least in respect of some of the steps taken. However, it is an error that resulted from the parties presenting an agreed position on scale costs to the Judge. It was not an error by the Judge to accept that position. Further, the difference between the correct calculation and the erroneous calculation would be, at most, less than $500. The circumstances do not justify leave to appeal.

Conclusion

[39] The application for leave to appeal the costs judgment is dismissed.

Solicitors:
Charles McGuiness Barrister and Solicitor Ltd, Wellington for Respondent

---

29 Costs judgment, above n 5, at [30].
30 Costs judgment, above n 5, at [31]–[32].